

1 Preferential transfer

2 Freddy Roberts v. United States 97-6006-fra  
3 (In re Freddy Roberts 695-60095-fra13)

4 8/22/97

FRA

Unpublished

5 The IRS made assessments for unpaid federal tax and filed a  
6 notice of tax lien approximately two years prior to the petition  
7 date. Within 90 days prior to the petition date, the IRS levied  
8 on the Debtor's Social Security benefits and obtained \$1,920  
9 thereby. The Debtor filed this adversary proceeding seeking to  
10 avoid the transfer as preferential and the Defendant filed a  
11 motion for summary judgment.

12 The court held that the IRS had a perfected security  
13 interest in the Debtor's right to receive Social Security  
14 benefits at the effective date of the federal tax lien. The  
15 transfer occurred more than 90 days prior to the petition date,  
16 thus there could be no preferential transfer. Defendant's motion  
17 for summary judgment was granted.  
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8 UNITED STATES BANKRUPTCY COURT  
9 DISTRICT OF OREGON  
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11 IN RE )  
12 FREDDY ROBERTS, ) Case No. 695-60095-fra13  
13 \_\_\_\_\_ Debtor. )  
14 FREDDY ROBERTS, ) Adv. Proc. No. 97-6006-fra  
15 Plaintiff, )  
16 vs. )  
17 UNITED STATES/IRS, )  
18 \_\_\_\_\_ Defendant. ) MEMORANDUM OPINION

19 FACTS

20 On June 15, 1992, the IRS made assessments against the  
21 Debtor for unpaid federal individual income taxes for the years  
22 1984 through 1986 totalling approximately \$97,000. Notices of  
23 Federal Tax Lien were filed on April 13, 1993 with the Josephine  
24 County Clerk's Office and with the Oregon Secretary of State.  
25 The IRS thereafter issued a notice of levy against the Debtor's  
26 Social Security benefits, the proceeds being applied against

1 Debtor's outstanding tax liability. On January 11, 1995 the  
2 Debtor filed his bankruptcy petition and the IRS thereafter filed  
3 a proof of claim in the amount \$128,270.60. Per the Debtor's  
4 confirmed Chapter 13 plan, \$7,000 of this amount is secured and  
5 the remainder is classified as nonpriority unsecured.

6 Debtor filed this adversary proceeding on January 9, 1997,  
7 alleging that the IRS obtained \$1,920 within 90 days of the  
8 petition date by way of its levy of Debtor's Social Security  
9 benefits. Further, that this constitutes a preferential transfer  
10 under 11 U.S.C. § 547 avoidable by the Debtor.<sup>1</sup> The Defendant  
11 filed a motion for summary judgment. For the reasons that  
12 follow, Defendant's motion will be allowed.

#### 13 DISCUSSION

14 To prevail in its motion for summary judgment, Defendant  
15 must prove that "there is no genuine issue of material fact and  
16 that the moving party is entitled to a judgment as a matter of  
17 law." Fed.R.Civ.P. 56(c). Summary judgment would be appropriate  
18 if the Defendant can demonstrate that an essential element of  
19 Plaintiff's prima facie case is missing. See Celotex Corp. v.  
20 Catrett, 477 U.S. 317,325 (1986).

21 To prevail in its action, the Plaintiff must prove that the  
22 elements of 11 U.S.C. § 547(b) are present. § 547(b) states that  
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24 <sup>1</sup>11 U.S.C. § 547(b) allows the trustee to avoid a transfer  
25 found to be preferential under that section. The Defendant  
26 appears to have stipulated to the Debtor being an allowable  
plaintiff in this proceeding. Because this question has not been  
raised in Defendant's pleadings, it will not be addressed here.

1 a transfer will be deemed preferential, and therefore avoidable,  
2 if the transfer is:

- 3 (1) to or for the benefit of a creditor;
- 4 (2) for or on account of an antecedent debt owed by the  
5 debtor before such transfer was made;
- 6 (3) made while the debtor was insolvent;
- 7 (4) made—
  - 8 (A) on or within 90 days before the date of  
the filing of the petition; or
  - 9 (B) between ninety days and one year before  
10 the date of the filing of the petition, if  
such creditor at the time of such transfer  
11 was an insider; and
- 12 (5) that enables such creditor to receive more than  
such creditor would receive if—
  - 13 (A) the case were a case under chapter 7 of  
this title;
  - 14 (B) the transfer had not been made; and
  - 15 (C) such creditor received payment of such  
16 debt to the extent provided by the provisions  
17 of this title.

#### 18 Defendant's Arguments

19 The Defendant admits that the first four elements of §  
20 547(b) are present, but argues that the fifth element is not:  
21 that the Defendant did not receive more by way of its levy than  
22 it would have received had it not levied on the disputed Social  
23 Security benefits and instead had been paid through the  
24 bankruptcy. The Defendant makes this argument based on the fact  
25 that Social Security benefits are exempt from execution for all  
26 debts except delinquent federal taxes. 26 U.S.C. § 6334(c). If

1 the IRS had not taken the Social Security benefits pursuant to  
2 its tax lien, no other creditors would have been entitled to  
3 them. At the petition date, then, the IRS's secured claim would  
4 have been \$1,920 higher. The IRS would have received the same  
5 amount regardless of whether the disputed Social Security  
6 benefits had been levied upon.

#### 7 Plaintiff's Arguments

8 The Debtor argues that there is a likelihood that the Debtor  
9 would have spent the Social Security benefits prior to the  
10 petition date,<sup>2</sup> so that there would have been no additional  
11 property at the petition date subject to the tax lien. This being  
12 the case, the Defendant would, according to the Debtor, have to  
13 prove for purposes of its motion for summary judgment that the  
14 disputed Social Security benefits would have been in existence at  
15 the petition date.

#### 16 Analysis

17 Section 6321 of the Internal Revenue Code creates a federal  
18 tax lien on "all property and rights to property, whether real or  
19 personal, belonging to [the taxpayer]." 26 U.S.C. § 6321. A  
20 question of primary significance in this case is the date on  
21 which the IRS is deemed to be secured with respect to the Social  
22 Security benefits - at the time of the actual levy, or at the  
23 effective date of the federal tax lien. If the former, then the  
24 transfers may arguably be preferential under § 547(b). If the

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26 <sup>2</sup> Presumably for consumables or items which would not otherwise increase  
the amount of Debtor's personal property subject to the federal tax lien.

1 latter, then the transfer would have actually occurred at the  
2 effective date of the IRS's federal tax lien, rather than the  
3 date that the IRS received the funds.

4 Courts have determined that a right to future payments is a  
5 property interest itself which is attachable by a federal tax  
6 lien. See In re Carlson, 180 B.R. 593 (Bankr. E.D. Cal.  
7 1995) (debtor's vested interest in state pension plan attachable  
8 by federal tax lien); In re Connor, 91-2 USTC 50,582 (Bankr. D.  
9 Alaska 1991) (right to payment of future state pension benefits  
10 subject to federal tax lien); In re Morris, 1993 WL 525657  
11 (Bankr. W.D. Tenn. 1993) (Social Security disability benefits  
12 subject to federal tax lien prior to the time actually received);  
13 In re Evans, 155 B.R. 234 (Bankr. N.D. Okla. 1993) (right to  
14 receive qualified pension plan payments is property right to  
15 which federal tax lien attached). Likewise, the Debtor's right  
16 to receive future Social Security benefits constitutes a property  
17 interest attachable by a federal tax lien. The federal tax lien  
18 is effective with respect to the taxpayer on the date of  
19 assessment, 26 U.S.C. § 6322, and is effective with respect to  
20 third parties on the date of filing of the Notice of Federal Tax  
21 Lien, 26 U.S.C. § 6323. The transfer, for purposes of § 547(b)  
22 occurred not when the IRS levied on the Social Security benefits,  
23 but at the earlier date when the right to receive those benefits  
24 became subject to the tax lien. Because the IRS had a valid tax  
25 lien against the Debtor's right to future Social Security  
26 benefits for more than two years prior to the petition date, the

1 Plaintiff cannot make a prima facia case under § 547(b) .

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3 CONCLUSION

4 11 U.S.C. § 547(b) requires, inter alia, that a transfer  
5 occur within 90 days of the petition date for the transfer to be  
6 deemed preferential under that section. Because the transfer in  
7 this case occurred more than 90 days prior to the petition date,  
8 the Debtor would be unable to prove all elements necessary under  
9 § 547(b). Accordingly, Defendant's motion for summary judgment  
10 is granted.

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14 FRANK R. ALLEY, III  
15 Bankruptcy Judge  
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20 cc: Barry Taub  
21 Joanne Duane  
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